



WORKING PAPERS

LAW 2013/12
Department of Law

Historical Revisionism in Comparative Perspective:
Law, Politics, and Surrogate Mourning

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EUI Working Paper LAW 2013/12

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
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Abstract

Recently the law on the Armenian genocide denial in France with a subsequent decision of the *Conseil Constitutionnel* (February 2012) shed fresh light on the controversial issue of historical revisionism. It disposed the issue in a wider perspective than a recurrent legal discussion on Holocaust denial. Furthermore, in drawing their bill, the authors of the French law invoked the EU Council Framework Decision 2008/913. This article demonstrates the chilling effects of that EU instrument for the freedom of speech in Europe. To these ends, it first explores the “European” model of legal engagement with historiography that is radically different from its counterpart in the USA. It further places this model in a fertile yet under-theorized comparative realm of three Central and Eastern European (CEE) countries: the Czech Republic, Hungary, and Poland. The CEE is a primary arena of the Holocaust, a region particularly sensitive to interpretations of World War II, and a battlefield of two totalitarian regimes. In normative terms, this comparative study of semantic and pragmatic differences between historical revisionism and hate speech, of victimhood and *mens rea* in the crime of Holocaust denial, as well as of the appropriation of selected episodes of World War II, concludes that the criminalization of historical revisionism constitutes a substantial impairment to the freedom of (academic) expression for the sake of politics of memory (*Geschichtspolitik*).

Keywords

Historical revisionism; Holocaust denial; hate speech; freedom of expression; Central and Eastern Europe

TABLE OF CONTENTS

0. Introduction	1
1. Normative Perspective on Historical Revisionism	2
1.1. Historical Revisionism: Terminology, Deontology, and Legal Neutrality	2
1.2. Is It Hate Speech?.....	4
1.3. Mens Rea and Victimhood.....	5
1.4. Freedom of Speech – Freedom to Construct Historic Narratives	7
1.5. The Proportionality of Criminalization	10
2. Historical Revisionism in European Law: Status and Recent Developments	11
2.1. Council of Europe	11
2.2. EU Law and Decision of the Conseil Constitutionnel	12
3. Historical Revisionism in Central and Eastern Europe	16
3.1. Context and Legal Aspects of Historical Revisionism in CEE.....	16
3.2. Historical Revisionism before Courts in CEE.....	18
4. Conclusions: Towards the Ethics of Memory via Free Speech	21

Historical Revisionism in Comparative Perspective: Law, Politics, and Surrogate Mourning

Uladzislau Belavusau*

0. Introduction

“The road to Auschwitz was built by hate, but paved with indifference.”

Ian Kershaw¹

A recent law on the Armenian genocide denial in France with a subsequent decision of the *Conseil Constitutionnel* shed fresh light on the controversial issue of historical revisionism. The legislative act of 31 January 2012 “prohibiting the contestation of the existence of the genocides recognized by the law” outlawed the glorification (*apologie*), denial (*négation*), and substantial trivialization (*banalisation grossière*) of the crime of genocide.² In its decision of 28 February 2012, the *Conseil Constitutionnel* invalidated the law as contradictory to the constitutional protection of free speech.³ Most interestingly, the rejected French law on genocide denial was drafted as a transposition of the EU law against racism.⁴ Therefore, the drafters of the French bill invoked a new EU instrument, the *Council Framework Decision 2008/913*, which (as will be argued in this paper) constitutes an explicit impairment of the right to freedom of academic expression in Europe.

The EU Framework Decision 2008/913, *inter alia*, introduces such punishable grounds as publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes when the conduct is likely to incite to violence or hatred against identifiable groups. Can a liberal democracy afford censorship of historiography for the sake of a more protected democratic governance, e.g. via a ban on a certain genocide denial? In the course of the last century, this question has been answered in a strikingly different way by various Western democracies, offering a somewhat libertarian (USA) free speech model and a more restrictive (Western-European) paradigm of constitutional thinking. Following the recent constitutional development in France, this paper offers to revisit the recurrent theme of historical revisionism in a new context. In doing so, it will explore historical revisionism in the socio-legal realm of three Central and Eastern European (further CEE) countries, namely: the Czech Republic, Hungary, and Poland.

In a broader methodological sense, these countries represent a somewhat idyllic study area. On the one hand, they are “young (transitional) democracies” on the map of Europe and “new Member States” of

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¹ Ian Kershaw, *Popular Opinion and Political Dissent in the Third Reich: Bavaria 1933-45*, OUP, 1983. 277.

² *Loi visant à réprimer la contestation de l'existence des génocides reconnus par la loi*, 31 janvier 2012. In 2001, France had symbolically recognized the fact of Armenian genocide by virtue of a special law, *Loi sur le génocide arménien*, 29 janvier 2001.

³ *Décision du Conseil Constitutionnel*, n° 2012-647 DC du 28 février 2012.

⁴ See *La Proposition de loi portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l'existence du génocide arménien*, 18 octobre 2011, No. 3842.

the European Union. On the other hand, they share a historical background deeply rooted in Western civilization, all three being sensitive to developments from the Council of Europe (in particular, the European Court of Human Rights) and the EU (mandatory law), as well as, to a lesser extent, from the US Supreme Court (non-mandatory, or persuasive law).

The issue of historical revisionism is a truly sensitive area in the CEE free speech debate. On the one hand, CEE is in fact the primary arena of the Holocaust since it was the region with the highest concentration of European Jewry and, accordingly, the largest number of Nazi victims. The issue of Holocaust denial in CEE is thus particularly sensitive, comparable to that in Germany and Austria. The museums commemorating the victims in the locations of Nazi concentration camps (such as, perhaps the most famous, Auschwitz in Poland) occupy an important space in the historical memory of CEE nations.

On the other hand, “the only true history” of World War II used to be nothing but a product of negotiation among the winning allies. Small CEE states became the hostages of superpowers and were deprived of equal competition on the “free market of historiographies”. The mass killings of Polish officers in Katyń (1940), Hungarian revisionist writings subsequent to the Treaty of Trianon (1920), *Vertreibungen* of Germans from Czech Sudetenland (1946), the massacre of the Jews in Polish Jedwabne (1941), anti-Soviet partisan movements, or the atrocities of the “winning” armies in Germany and Central Europe have not been accommodated under the-only-trustworthy historical truth.

Hence, both legislators and judges in the region have been destined to choose between the pragmatic American and preventive European approaches, often balancing on the slippery slope between militant democracy and the pure politics of memory.

The structure of this paper reflects its twofold character, descriptive and normative. The introduction will be followed by the first, normative part, analyzing the limits of legal engagements with memory and distilling the fallacies of criminalization. The second and third parts will introduce a broader descriptive study of historical revisionism. While the current “European” model (including the EU Framework Decision and the recent feedback from the *Conseil Constitutionnel* in France) are the matter of scrutiny in the second part, the third part will address how the legislators and judges of the transitional post-communist era in the Czech Republic, Hungary, and Poland have dealt with the historic controversies. Finally, the conclusions will summarize the argument about chilling effect of memory laws exemplified by CEE developments.

1. Normative Perspective on Historical Revisionism

1.1. Historical Revisionism: Terminology, Deontology, and Legal Neutrality

“Shoah fatigue is a widespread and understandable condition. Like the flu it comes in many variants. There is the narcissistic, self-pitying (and self-promoting) Walser strain – fairly repulsive even if innocuous. There is the far more virulent Nolte strain: angry, accusatory and sanctimonious. There are the pathological cases of Holocaust Deniers. And then, like the common cold, there is the Garden Variety: on a Saturday evening, all things told, I would rather see The Hours than the Pianist.”

J.H.H. Weiler⁵

The term “historical revisionism” seems to be a fair compromise among the concurring labels for strictly legalistic purposes, since the scope of the problem is hardly reducible exclusively to what is

⁵ J.H.H. Weiler, “Epilogue: Europe’s Dark Legacy Reclaiming Nationalism and Patriotism”, in Christian Joerges & Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Hart, 2003. 339-402 (at p. 339).

commonly tagged as Holocaust (Shoah) denial. One of the biggest traps for legal scholars who attempt to research the problem is a natural temptation to perceive the whole issue in the Procrustean bed of Jewish genocide during World War II. A legislative response to the challenge of the alternative (truth-denial) narratives may cover various types of expressions, in particular those trivializing genocide, war crimes and crimes against humanity,⁶ as well as those “white-washing” the perpetrators and their accomplices.

“Genocide denial” also seems to be a somewhat narrower term. “Genocide” itself is a conventional post-war label introduced by a Jewish lawyer (with descent from Belarus-Poland), Raphael Lemkin. First formulated in the essay *Crime of Barbarity*, his proposal for a ban on crimes against humanity suffered serious rebuffs at the Paris Peace Conference in 1945 but was finally taken into consideration by the General Assembly and framed into the Convention on the Prevention and Punishment of the Crime of Genocide.⁷

The *Holocaust*,⁸ or *Shoah*,⁹ is a semantically restricted term applicable to the acts of mass atrocities and physical annihilation of approximately six million European Jews by the Nazis and their allies. This infamous episode of history constitutes a unique symbolic phenomenon in the collective memory of the nations involved in these tragic events.

David Fraser, scholar of the legal problems relating to post-War collective memories, summarizes the following ideas central to the Holocaust (or for the relevant authors, “so-called Holocaust”) denial:¹⁰

1. The Holocaust did not occur because there is no so-called Hitler document: a written order from Hitler requiring the killing of Jews.
2. There were no gas chambers used for killing Jews and others in the camps. Gas was used to decontaminate prisoners’ clothing. The deaths in the various prison or concentration camps were due to a combination of disease, deprivation caused by war, and bombing attacks by the Allies.
3. Eyewitness testimony of “survivors” is untrustworthy either because of the psychological illnesses of the witnesses or their personal stake in obtaining compensation.
4. The compensation industry is a plot by international Jews/Zionists to extract payments from an innocent and victimized Germany.

The rhetoric of Holocaust deniers is usually informed by vigorous anti-Semitism and is specific but not limited to certain radical right-wing movements in the Western world. The “political deniers”,

⁶ To demonstrate the broad scope of these crimes, Article 7 of the Rome Statute of the International Criminal Court enlists the following atrocities as “crimes against humanity”: murder, extermination, enslavement, deportation, or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparative gravity; persecution against any identifiable group or collectivity on a political, racial, national, ethnic, cultural, religious, or gender basis; forced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to “mental or physical health”.

⁷ Lemkin’s own definition of genocide was much broader. See Raphael Lemkin & Samantha Power, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposal for Redress*, Lawbook Exchange, 2005. Originally published as R. Lemkin: Washington, Carnegie Endowment for International Peace, Division of International Law, 1944. I dwell further on the contradictory history of the negotiation of post-War instruments in the part on international law *infra*.

⁸ From Greek *λόκαυστον* [holókauston], where *holos* means “completely” and *kaustos* means “burnt”.

⁹ In Judaic tradition, the word *Holocaust* may bear ambiguous connotations, being perceived as an Ancient Greek, and, consequently pagan, word. Therefore, the biblical word *Shoah* (שואה in Hebrew, literally “calamity”) is preferable.

¹⁰ David Fraser, “‘On the Internet, Nobody Knows You’re a Nazi’: Some Comparative Legal Aspects of Holocaust Denial on the WWW”, in Ivan Hare & James Weinstein (eds.), *Extreme Speech and Democracy*, OUP, 2009. 511-537. For a more detailed description of the arguments, see Pierre Vidal-Naquet, *Assassins of Memory. Essays on the Denial of the Holocaust*, Columbia University Press, 1992. 1-65.

including Islamists and the machinery of anti-Israeli propaganda in many Muslim states, occupy an important layer inside the contemporary movement.¹¹

Therefore, it is necessary to underline that the choice to use the term “revisionism” in this article is by no means an ethical attempt to dress Holocaust denial into the guise of appropriate academic discourse. The ambiguity stems from the historiographic traditions, in which *historical revisionism* applies to the narratives of critical reinterpretation of the historical facts on the bases of evidence, motivations, and other societal factors of particular historical moments.¹² Another confusion appears due to the fact that several Holocaust deniers themselves prefer the tag of historical revisionists since, according to them, it is not that they claim the non-existence of Holocaust, but rather they question the empirical evidence and the actual number of victims. In this sense, their approach to historical memory is a highly political enterprise, where historical methodology of truth-finding is substituted with empirical manipulation (forged documents, trivialization of suffering, statistical fraud, logical fallacies, mistranslation of sources in foreign languages, etc.) to address the propagandistic machinery of hate groups. It is certainly too demanding and unrealistic to expect from the general public a thorough insight into historic methodology to distinguish the academic canon of trustworthiness.

Nonetheless, a more general tag of *historical revisionism* is indispensable in the legal context, since *les lois mémorielles* (“memory laws”) transcend pure Holocaust denial (covering in different countries, *inter alia*, the issues of Armenian genocide, reproof of Nazi collaborationists, slavery, assessment of Franco’s dictatorship in Spain, and the symbolic status of Atatürk in Turkey, or even Japanese ministerial vetting on military history books). Finally, the term seems to bear necessary neutrality for the proper deontological (ethically neutral) deliberation of a lawyer who tries to maintain the important space of objectivity while assessing the facts.

1.2. Is It Hate Speech?

One of the greatest paradoxes of legal writings about the issues of historical revisionism is the immediate attribution of hate speech characteristics to revisionism by an absolute majority of scholars. Therefore, a somewhat disregarded question is to what degree historical revisionism actually constitutes hate speech.

On the one hand, it is true that the revisionist (especially Holocaust denial) narratives treat certain fragments of community memory and target particular ethnic groups in a way that is evidently informed by the (often utterly) xenophobic beliefs of their authors. On the other hand, such discursive practices traditionally stick to a racially neutral rhetoric and avoid explicit appeals for aggression towards the target groups. One explanation to this is an aspiration of the respective authors to dress their ideas up into the mantle of trustworthy historical discourse. In addition, such authors may be simply prudent enough to avoid criminal prosecution for the propaganda of hatred. This latter consideration reveals that the separation of hate speech from historical revisionism arises already at the intuitive level.

¹¹ Here one can recall several exemplary initiatives of the Iranian government in recent years, including the state award for the best caricature of the “so-called Holocaust” (consequent to the “Danish turmoil” around the caricatures of Prophet Mohamed), the Tehran Holocaust Conference (December 2006), and the establishment of the Foundation of Holocaust (denial) studies. For extensive materials on Holocaust denial in Iran, see electronic resource: <http://www.iranholocaustdenial.com/>

¹² “The first modern ‘revisionists’ were, in France, the partisans of a ‘revision’ or judicial review of the trial of Alfred Dreyfus (1894), but the word was quickly turned around by their adversaries, and that reversal should be considered as symptomatic. The word has subsequently taken on a meaning that is at times positive, at times negative, always implying the critique of a dominant orthodoxy. Bernstein and his friends were revisionists in relation to orthodox Marxists and the term has transmitted to the Maoists who use it to characterize their Soviet enemies. In relation to traditional Zionism, the disciples of Vladimir Jabotinsky, currently in power in Israel, were also ‘revisionists’, as are the American historians who contest the officially and traditionally received version of the origins of the Cold War”. Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, Columbia University Press, 1992. 79.

The assumption of a fundamental difference between hate speech (i.e. non-cognitive slurs, which appeal to the emotions and irrational phobias against minorities) and historical revisionism (i.e. cognitive and factually based speech) may be equally based on the *speech acts theory*.¹³ The attribution of hate speech characteristics to revisionist narratives will imply their *performative* potential. In case of hate speech, the *action-in-speaking* stems from the traumatizing slur comparable to splashing a random person with mud on a public square. A hateful utterance is clearly addressed towards a person from a historically oppressed group. Despite the fact that, for instance, Holocaust denial is often informed by anti-Semitic sentiments, such attributions are still arguable. The performative potential of revisionist narrative is vague since it lacks several important elements to suggest its speech act significance: an individual addressee, attribution of inferiority, manifest danger of suppression, and, finally, any incitement to violence, distinguishable, at least, at the emotional level in the case of hate speech, with its indispensable historical context of suppression behind a concrete utterance.

1.3. Mens Rea and Victimhood

As Hungarian constitutionalist Renáta Uitz formulated the significance of oblivion for historic memories, albeit in somewhat different constitutional perspective:

One of the most intriguing and controversial factors shaping memories of past events is forgetting. For some, a proper account of the past is viewed as instrumental in seeking justice with respect to past injustice, while forgetting is cast as an occurrence to be avoided at all costs [...]. On the other hand, for a legal approach to reconciliation as dealing with past trauma, forgetting does not only refer to the fading of memories of past events of one's own or a polity's account of the past, but also to pre-mastered strategies of oblivion.¹⁴

In the context of Holocaust, "oblivion" acquires a special meaning. In contemporary Western culture, with its embedded Christian assumptions of repentance and confession, the concept of apology is an indispensable tool for overcoming the discomfort of past traumas. "Feeling guilty" may be easily considered as somewhat unhealthy. By contrast, Judaism teaches that there is no full forgiveness for murder in this world, even if the culprit devotes his or her life to repentance and acts of goodness. Therefore, within the scope of Judaic theodicies of evil, neither the symbolic penance of the offspring(s) of perpetrator(s) before the descendants of victim(s), nor the apology for those killed before their communities is relevant. Only a direct victim can forgive her or his perpetrator.¹⁵

As further exposed by J.H.H. Weiler:¹⁶

Jewish law and custom prescribe elaborate rites for mourning the dead. Normally the full rigor of these duties falls on a certain class of relatives, principally sons and daughters, and their immediate surrounding community. [...] should someone die without relatives, thus leaving one in need of psychological healing, the Talmud indicates that the Community must appoint surrogate mourners who themselves must assume the duties of survivorship and who are treated by the

¹³ The discussion on the performative effect of hate speech is rooted into the *speech acts theory*, introduced by J.L. Austin in *How to Do Things with Words*. J.R. Searle in *Speech Acts* further essentially developed the concept. For a widely-cited rhetorical reconstruction of hate speech and pornography through the methodology of speech acts, see Judith Butler, *Excitable Speech: A Politics of the Performative*, Routledge, 1997.

¹⁴ Renáta Uitz, *Constitutions, Courts and History: Historical Narratives in Constitutional Adjudications*, CEU Press, 2005. 242. Uitz refers to oblivion in the context of transition in the postcommunist states.

¹⁵ For the account of Judaic "apology", see Arnaldo Momigliano, Silvia Berti, Maura Masella-Gayley, *Essays on Ancient and Modern Judaism*, University of Chicago Press, 1994. 58-66. For a general account of apology, see Aaron Lazare, *On Apology*, OUP, 2004.

¹⁶ J.H.H. Weiler, "Epilogue: Europe's Dark Legacy Reclaiming Nationalism and Patriotism", in Christian Joerges & Navraj Singh Ghaleigh, *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Hart, 2003. 339-402 (at pp. 390-391).

community as if they had actually suffered loss. Nobody is in psychological need, and yet we go through the communal motions of mourning.

This extreme measure is predicated on the abhorrence of allowing someone to die without due notice. To do so would diminish life itself, and indicate a profound failing of the community. It is about the human dignity resulting from being born in His image – the dignity of the dead but also of the living.

The 20th century was a particular landmark for Jewish history, when after experiencing the tragedy of Holocaust and the destruction of the traditional centres of Jewry in Europe, the scattered nation returned to its Biblical homeland, followed by a linguistic shift from Yiddish to Hebrew as well as the reestablishment of Jewish studies and spirituality in Israel and America. Consequently, the trauma of the Shoah bears a particular significance, first of all, for Israeli society and Jewish communities abroad.

Nonetheless, if the central idea of the criminalizing ban for revisionist narratives stems from a noble intention to redress the harm by apology, i.e. through a legal exclusion of the untruthful writings – it is unclear just to whom this affirmative action to truth is addressed. Legislative control over the collective memory may have been pertinent in the initial post-war decades. The perpetrators are supposedly named and punished. The degrading ideologies of racism and anti-Semitism are condemned. The victims are recognized. What kind of addressee (or putting it in Weiler's terms, an "appointed surrogate mourner") is meant for the 21st century with its practically "unrestrictable" flow of information (the Internet) and sceptical attitude to the cognition of historic dogmas? If the criminal ban is designed as an affirmative support to the communities of Holocaust victims (similarly to hate speech victims), how do we construct the very criminal concept of *victim*? Considering the inevitable decrease of Holocaust survivors, should we in the future establish a legal fiction of "second and third generation(s)" of traumatized victims?

Therefore, the rationale of prohibition should be based not on the victims but on the epistemological fact of the truth. Legal exclusion of certain historic narratives is definitely not the sole mode to confront the past and address the traumas of common memory, as was perfectly exemplified by Theodor Adorno.¹⁷ The whole institutional system of a society can be designed in a way advancing "truthful" historical discourses through education, public discussion, commemoration, and symbolic presence of genocide traumas in the semiotic space of camp-museums, memorials, and annual artistic events. Intimidation through a criminal ban will hardly safeguard the same effectiveness. Unlike pure hate speech, any historical text is subjected to interpretation and disputes. Ultimately, we cannot criminalize human narrow-mindedness, apathy, absurdity, and naivety. In this regard, a scholar of the "negationism" discourses, Pierre Vidal-Naquet, makes a thought-provoking observation:¹⁸

Would one say that there is one school maintaining that the Bastille was taken on July 14, 1789, and another one claiming it was taken on the 15th. We are at this point on the terrain of positive history, wie es eigentlich gewesen, as things actually transpired, according to Ranke's nineteenth-century formula, a formula in which truth is opposed to falsehood, independently of any interpretation.

Thus, similarly to the logic of defamation cases and especially that of the prohibition on misleading advertising, the criminalization of historical revisionism should be based foremost on the assumption of distinction between facts and opinions, where the latter enjoy wider protection in comparison to the former. This assumption leads to the idea that if Holocaust denial is *malum in se*, we should reveal the necessary factual *mens rea* (or *actus reus*) of this crime. The identification of facts will be a complicated enterprise with several judicial pitfalls.

¹⁷ Theodore Adorno, "What Does Coming to Terms with the Past Mean?", in Geoffrey Hartman (ed.), *Bitburg in Moral and Political Perspective*, Indiana University Press, 1986. 114-129.

¹⁸ Pierre Vidal-Naquet, *Assasin of Memory: Essays on the Denial of the Holocaust*, Columbia University Press, 1992.

On the one hand, the debate on whatever *genocide* poses the inevitable question of whether it is legitimate to apply the term retrospectively to events that, *stricto sensu* of criminal law, preceded the concept of “genocide”. On the other hand, it is doubtfully legitimate to burden a judge with the deliberation on what constitutes true historical fact, dealing with a subtle discipline (of history), which tolerates a great pluralism in its fact-reconstruction methodology.

1.4. Freedom of Speech – Freedom to Construct Historic Narratives

Judging the past makes historiography resemble a court of law, but the vocation is different. Historians exhume the dead in order to create a family story, a genealogy in which dead and living are part of the same community.

The celebration of victories, heroic acts, and conquests or the mourning of defeats is a main trope of modern history and of European nationalism in particular.

Costas Douzinas¹⁹

Eric Barendt makes a relevant distinction, drawn from the German constitutional model, between freedom of expression of opinion (guaranteed by Article 5 (1) of the *Grundgesetz*) and scientific freedom (guaranteed by Article 5 (3) of the *Grundgesetz*).²⁰ It matters how the utterance is characterized, since general laws may limit the expression of a political opinion, while the exercise of scientific freedom (*Wissenschaftsfreiheit*) can be restricted only by laws protecting other constitutional rights and values, notably human dignity:

Wissenschaftsfreiheit can be asserted by anyone – not only academics – whose publication or communication indicates a serious intention to express the truth. Extramural political speech and activity are covered by freedom of expression rather than scientific freedom, for they are not disseminated to further knowledge or state new truths. In accordance with this principle, an Administrative Court in Kassel held that a medical student could not claim academic freedom (*akademische Freiheit*) when in infringement of the state university law he distributed party political leaflets and displayed placards in the medical school.²¹

This distinction between *Wissenschaftsfreiheit* and other layers of speech may be a heuristically fruitful instrument for the assessment of historical revisionism as an academic phenomenon in the realm of constitutionally protected freedom of speech rather than hate speech, despite the very contradiction with German law and its obsession with *Vergangenheitsbewältigung* (the effort to cope with one’s past), from where the distinction stems. Academic freedom is an important part of the right to freedom of speech, which implies a vast liberty for the construction of historical narratives.

The legislative selection of the appropriate historical narratives triggers a slippery slope of differentiation between various (and unfortunately, numerous) atrocities in the history of Western

¹⁹ Costas Douzinas, *History Trials: Can Law Decide History?*, *Annual Review of Law and Social Science*, 8, 2012. 273-289 (at p. 274 and 275). The article by Douzinas is a sophisticated socio-legal inquiry into the nature of historical trials. The author shows the unsuitability of legal proceedings for clarifying historical record, through the exploration of the post-revolutionary writings in France and Hannah Arendt’s accounts in her book, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin 1994 (first published in 1963). Arendt convincingly demonstrated how the well-staged trial of the Nazi official was appropriated for the benefit of Israeli state ideology, trivializing the evil of the Holocaust instead of clarifying the historical record.

²⁰ Eric Barendt, *Academic Freedom and the Law: A Comparative Study*, Hart, 2010. 277. For a thoughtful exposition of the First Amendment in terms of academic freedom in the USA, see Robert C. Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State*, Yale University Press, 2012.

²¹ *Ibid.*

civilization. The list includes the positions on slavery and colonial violence,²² the complicated reconciliation of the genocide of Armenians and subsequent “Turkish denial”; *Holodomor* (the deliberate policy of starvation by the Bolsheviks in Ukraine in the 1920s), occupation of the Baltic states, the genocide of the Crimean Tatars, mass atrocities in Chechnya, and the contemporary Russian refusal to recognize all of these facts, to name just a few.

The Katyń massacre,²³ the mass execution of Polish officers and prisoners of war from Western Belarus and Ukraine in 1940, is an indicative example of the unceasing warfare between national historiographies. Up until 2010, according to the official Russian version, the Nazis committed the respective atrocities whereas most Western historians unequivocally concluded that it was the Soviet NKVD (secret police), which organised and committed mass executions by shooting.²⁴ This shameful speculation on such a sensitive issue perfectly illustrates the ultimately political character of what can be called the post-war negotiation of history, where the “victors never explain”. In Central and Eastern Europe, before the fall of the Berlin Wall the only permissible version of the war history was akin to the adage “good Russians – bad Germans”. The invasion of Soviet Army in the CEE countries was postulated as liberation from the Nazi invaders (*освобождение от немецко-фашистских захватчиков* in Russian). Any attempts to proclaim the facts of Soviet occupation, the horrors of the Siberian camps,²⁵ the forceful resettlement of peoples, the destruction of important cultural and religious objects, mass rapes of German and Hungarian women by Soviet soldiers, the positive side of the anti-Soviet (so-called collaborationist) movements on the occupied territories, and so on, were severely suppressed.²⁶ Russian Federation has often demonstrated a persistent reluctance to acknowledge a series of Soviet atrocities in practice comparable to Holocaust denial.

Furthermore, there is something of almost ironic nature about the Holocaust (as a legally sacrificed instance of historical injustice) in terms of its subsequent instrumentalization for the foundational legitimization of the Israeli state and Zionist national ethos.²⁷ Despite being a recognized democracy, the Israeli courts’ grappling with historical injustices sometimes illustrates a case of perverse cultural

²² See Romain Bertrand, *Mémoire d’empire : la controverse autour du ‘fait’ colonial*, Editions de Croquant et Savoir, 2006.

²³ ‘*Zbrodnia katyńska*’ as an important aspect of Polish common memory (1940). In this context, see the most recent decision of the ECtHR against Russian Federation, Case of *Janowiec & others v. Russia*, Application nos. 55508/07 & 29520/05 [16 April 2012]. In Point 161, the Court observes that: “On 26 November 2010 the Russian Duma adopted a statement on the Katyń tragedy and its victims, in which it recognised that the Polish prisoners-of-war had been shot dead and that their death on the USSR territory had been “an arbitrary act by the totalitarian State”. It also considered necessary “to continue studying the archives, verifying the lists of victims, restoring the good names of those who perished in Katyń and other places, and uncovering the circumstances of the tragedy”. However, the declaration did not lead to a re-opening of the investigation, declassification of its materials, including the decision on its discontinuation, or any attempts on the part of the Russian authorities to establish direct contacts with the victims of the Katyń massacre and involve them into the elucidation of its circumstances. Being a mere political declaration without any visible follow-up, it did little to alleviate the feeling of frustration, since the previously made allegations that the applicants’ relatives might have been criminally responsible, were not explicitly dismissed.”

²⁴ In the USSR of the Brezhnev era, the Belarusian village of *Khatyn* became the Mecca of victimhood exemplifying Nazi atrocities. The Nazis with the participation of Ukrainian and Belarusian collaborators burnt 149 inhabitants of the village alive. However, that number of inhabitants is not the record number of victims, which include several neighbouring villages in Belarus itself. Contemporary historians consider *Khatyn* [*Хатынь / Chatyn*, in Belarusian] to have been chosen to perform this façade role merely for its distinctive phonetic similarity in Slavic languages with *Katyń*. In such a way, the Soviet ideologists were trying to divert attention from the NKVD massacre of Polish officers. See Norman Davies, *Europe: A History*, OUP, 1996. 1005.

²⁵ In fact, many Soviet citizens, victims of Nazi camps, were subsequently sent to Siberian camps as “traitors who yielded themselves as prisoners”.

²⁶ See, in particular, Norman M. Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949*, Harvard University Press, 1995; Catherine Merridale, *Ivan's War: the Red Army 1939-1945*, Faber and Faber, 2005; Tony Judt, *A History of Europe Since 1945*, Penguin, 2006.

²⁷ For the “instrumentalization” accounts of the Shoah in Israel, see Tom Segev, *The Seventh Million: The Israelis and the Holocaust*, Picador, 2000; Idith Zertal, *Israel's Holocaust and the Politics of Nationhood*, Cambridge University Press, 2005.

denial of historical atrocities. For example, in its recent decision the Supreme Court (sitting as the High Court of Israel) rejected the petition challenging the so-called “Nakba Law”, approved by the Knesset in 2011.²⁸ The legislative provision authorized reducing government funding to any NGO that supports Nakba commemoration events. *Nakba* (literally “the day of Catastrophe” in Arabic) is an annual Palestinian mourning about the tragic displacement (of approximately 700,000 people) that followed the Israeli Declaration of Independence in 1948. The Court used a convenient but highly disputable administrative avoidance, ruling that since there is no actual example of an organization losing funds, the case is null.²⁹

Moreover, the Holocaust is perhaps the most thoroughly studied and mutually recognized of the Nazi atrocities during World War II. However, other identifiable victims of similar atrocities have not acquired such prominent representation in the official historiographies in Europe, including the persecution of Roma, homosexuals, and disabled persons, not to mention that in Himmler’s perception of pure race a large portion of Slavic peoples were destined to disappear.

Some scholars contradict this, suggesting, as Fraser, that “the members of no other group were targeted for complete and instant annihilation simply because they were racially identified as belonging to the enemy race”.³⁰ Fraser argues that an important difference is that homosexual men were targeted but under the guise of a criminal code provision which preceded the Nazi “rise to power”. At the same time, “Gypsies (Roma and Sinti) were racially *Arisch* (Aryan) and, therefore, were in principle persecuted as asocial or criminal elements” rather for their nomadic lifestyle than for their racial identity.³¹

This position seems doubtful if several arguments are considered. First of all, although prosecution of Jews was not tagged as a criminal norm preceding the Nazi regime in Germany, it definitely was inspired by the centuries of European ghettos and radical anti-Semitism within medieval Christian culture.

Secondly, in the case of homosexuals, what mattered was not the criminal act itself but the criminal intent, a vision justified by “*gesundes Volksempfinden*” (healthy sensibility of the people), as a leading principle. Himmler himself described gays as the “definers of German blood”. Perhaps the most shameful aspect of this page in the volume of Nazi atrocities towards homosexual people is the fact that a full reconstruction of the “gay Holocaust” became possible only recently and, in contrast to Jews, many LGBT victims hid their stories because “sodomy” remained criminalized in post-war Germany.³²

Thirdly, there was nothing in the criminal legislation of pre-Nazi Germany about the permissibility of the medical experiments on homosexuals, nor did it call for castration or physical annihilation.

Fourthly, similarly to Jews and gay men, Roma people, disabled persons, and adherents to the Jehovah’s Witness sect, became the subjects of demonized prosecution leading to annihilation and permitting severe medical torture, which explicitly transcends practices of social exclusion in pre-Nazi

²⁸ The Budget Foundations Law (Amendment No. 40) 2011, adopted March 23, 2011.

²⁹ High Court of Justice Decision 3429/11, *Alumni of the Arab Orthodox High School in Haifa et al. v. The Minister of Finance et al.* (5 January 2012, not yet published) [the “Nakba Law” case].

³⁰ David Fraser, ““On the Internet, Nobody Knows You’re a Nazi”: Some Comparative Legal Aspects of Holocaust Denial on the WWW”, in Ivan Hare & James Weinstein (eds.), *Extreme Speech and Democracy*, OUP, 2009. 511-537 (at p. 517).

³¹ *Ibid.*

³² For a detailed account, see James Steakley, *Homosexuals and the Third Reich*, *The Body Politics*, 2, 1974. 15-18; Geoffrey J. Giles, ““The Most Unkindest Cut of All”: Castration, Homosexuality and Nazi Justice”, *Journal of Contemporary History*, 27, 7, 1992. 41-61. Not only were reparations and pensions not available to them as in case of other victims in the post-war period, but on the contrary, many homosexual men were further imprisoned by the Allied authorities under allegations collected by the Nazis. The German government acknowledged the prosecutions only in the 1980s, while the first government apology appeared only in 2002.

period. In addition, the number of physically annihilated Slavic people (especially Poles, Serbs, Belarusians, Ukrainians, and Russians) constitutes around 4 million, which is comparable to the victims of Holocaust.³³ The list of the identifiable groups targeted for Nazi atrocities also includes communists, socialists, and trade unionists.

The segregation of Roma and Sinti people is another shameful page of the post-war historiography due to a deliberate avoidance of the oral-history evidence from the survivors of what can be called the “Gypsy genocide” (*Porajamos* in Roma dialects). A Gypsy-Jewish differentiation of Fraser about the exclusively “asocial” character of the prosecution of the Roma, sounds somewhat striking considering that in 1942 and 1943 Heinrich Himmler issued several decrees ordering the deportation of all German “gypsies” to Auschwitz.³⁴

Likewise, the recent decision of the French *Conseil Constitutionnel* refers to the principle of equality in constructing the subjects excluded from the protection of freedom of expression and observes that:

[...] qu'en réprimant seulement, d'une part, les génocides reconnus par la loi française et, d'autre part, les génocides à l'exclusion des autres crimes contre l'humanité, ces dispositions méconnaîtraient également le principe d'égalité [...]³⁵

The history of World War II has been a negotiated political enterprise of the mutually comfortable views for the victors. Therefore, the legal exclusion of certain historical narratives parallel to the instrumentalization of other historical facts, guilt, and shame, leave the question of whether law is actually a genuine device to preserve social harmony or just a selective tool to create a populist impression of the fight with far-right ideologies.

1.5. The Proportionality of Criminalization

The number of historians producing revisionist texts is not great, and they are already socially stigmatized as marginal and ludicrous figures. When a suit against them is brought to a criminal tribunal, a spectacular publicity is provoked which they hardly deserve. Most unfortunately, it may even pave the way for populist claims about (in particular, Jewish) conspiracy, aggravating the chilling effect, which is of no comparison to that followed by a hate speech ban. The latter is based on the public assumption of the “offence and trauma” to a concrete person or identifiable group. The former situation leaves an incentive to maintain that the very enterprise of “truth-finding” is severely censored. In the vast majorities of cases, the supporters of revisionism cannot boast of recognized intellectual prominence. However, their audience is traditionally sensitive to all sorts of populist indoctrinations. The criminalizing legislation *per se* may create a fertile atmosphere for this revisionist hysteria.

Since the traditional Strasbourg approach to free speech cases regards any criminalization as a disproportional measure (even in the case of hate speech),³⁶ then why should historical revisionism be legitimately regarded as a valid exception? There is the whole body of anti-discrimination law. There

³³ The plan of Slavic genocide was designed by the Nazis with a perspective of 20-25 years.

³⁴ Michael Burleigh & Wolfgang Wippermann, *The Racial State: Germany 1933-1945*, CUP, 1991. See especially at pp.113-27; David Crow & John Koisti, *The Gypsies of Eastern Europe*, Armonk, 1991; Sybil Milton, “The Holocaust: the Gypsies”, in William S. Parsons, Israel Chamy, & Samuel Totten (eds.), *Genocide in the Twentieth Century: An Anthology of Critical Essays and Oral History*, Garland, 1995. 209-64; Donald Kenrick and Grattan Puxon, *The Destiny of Europe's Gypsies*, Basic Books, 1972.

³⁵ “In suppressing only genocides recognized by French law while excluding other crimes against humanity, these provisions also disregard the principle of equality” (*Décision du Conseil Constitutionnel*, n° 2012-647 DC du 28 février 2012, para. 3). Notwithstanding the fact that this decision de-criminalized the denial of Armenian genocide, Holocaust denial remains criminalized in France.

³⁶ Thus, on several occasions the ECtHR pronounced that criminal prosecution for defamation in the press by national courts was a disproportionate measure.

are numerous public policy derogations that prohibit hate speech and defamation. Moreover, most European countries have enacted criminal provisions for those who incite hatred between different national groups. Last but not least, there is an important space for affirmative action and collective memory about the Shoah through the education system and the respective construction of the symbolic space of cultural memory.

Unless the respective narrative contains a claim for racial superiority or appeals for aggression targeting particular individuals, identifiable groups or communities, historical revisionism constitutes just an expression of views within the realm of historiography, albeit even inane, socially irritating, or harsh form of expression.

2. Historical Revisionism in European Law: Status and Recent Developments

Unlike in the USA (where historical revisionism is undoubtedly covered by the wide protective scope of the First Amendment to the American Constitution),³⁷ the European model of engagement with memory is more complex, hosting layers on the national level, OSCE, Council of Europe and, finally, European Union. Since apart from three CEE countries (discussed further in part 3) and a recent French example, national legislation does not fall into the scope of this paper,³⁸ the focus will be further put on the instruments within the system of the Council of Europe as well as on the recent developments on xenophobic speech and Holocaust denial within EU law.

2.1. Council of Europe

The legal core of the position on Holocaust denial in the Council of Europe stems from the *Declaration of the Stockholm International Forum on the Holocaust* (2000) where states agreed to institute educational programmes and national commemorative initiatives. This Declaration was followed by the *European Parliament Resolution on Remembrance of the Holocaust, Anti-Semitism and Racism* (2005). The parallel supporting instruments of the OSCE include the *Permanent Council*

³⁷ The American legal approach to the problem may be deduced in the laconic conclusion of James Weinstein that “for a mixture of theoretical and practical reasons, the [Supreme] Court would probably find that the most salient harm caused by Holocaust denial that government can legitimately address – the infliction of psychic injury of Holocaust survivors and their families – is not weighty enough to justify the suppression of even false statements within public discourse” (see James Weinstein, “An Overview of American Free Speech Doctrine and Its Application to Extreme Speech”, in Ian Hare & James Weinstein (eds.), *Extreme Speech and Democracy*, OUP, 2009, 90). Although historical revisionism (unlike hate speech) has never been an issue for the Supreme Court, the USA is definitively a hotbed of revisionist narratives among Western democracies precisely due to the libertarian construction the free speech epistemology in (“harder”) hate speech cases. For a detailed overview of differences in the approach to hate speech in the USA and Europe, see Uladzislau Belavusau, *Judicial Epistemology of Free Speech Through Ancient Lenses*, *International Journal for the Semiotics of Law*, 23, 2010. 165-183; Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: a Comparative Analysis*, *Cardozo Law Review*, 24, 2002. 1523-1567; Frederic Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study In Comparative Constitutional Architecture*, Faculty Research Working Paper Series, Harvard University, RWP05-019, 2005. 1-25. In part, the difference in judicial reasoning in the USA and Europe may be attributed to the appraisal of Holocaust as a specifically European stigma. However, this approach does not explain why in neighboring Canada the legal prohibition is reminiscent of the European approach.

³⁸ For perhaps the most detailed summary of the comparative perspectives on the problem, see Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Perspective*, Palgrave Macmillan, 2004, and the recent collection of articles in Ludovic Hennebel & Thomas Hochman (eds.), *Genocide Denial and the Law*, OUP, 2011; Kenneth Bertrams, Pierre-Olivier de Broux, « Du négationnisme au devoir de mémoire. L'histoire est-elle prisonnière ou gardienne de la liberté d'expression? », in « Les propos qui heurtent, choquent ou inquiètent », *Revue de droit de l'Université libre de Bruxelles*, Bruylant, 2008, 75-134; Domenico Losurdo, *Il Revisionismo storico: Problemi e miti*, Laterza, 1996. British scholar Michael Whine brings interesting statistical arguments and demonstrates that before the imposition of the Holocaust-denial ban into legislation, the UK was a world centre for publishing such materials (in the 1980s and 1990s). See Michael Whine, “Expanding Holocaust Denial and Legislation Against It”, in Ian Hare & James Weinstein (eds.), *Extreme Speech and Democracy*, OUP, 2009. 539.

Resolution (2004), *the Berlin Declaration* (2004), *the Cordoba Declaration* (2005), and *the Brussels Declaration of the OSCE Parliamentary Assembly* (2006).

In March 2007, the European Monitoring Centre on Racism and Xenophobia reconstituted with the newly formed European Union Agency for Fundamental Rights. The organization came up with the *Working Definition of Anti-Semitism*, intended as a road map for criminal justice tribunals.³⁹ The Working Definition, in particular, identifies as manifestly anti-Semitic acts of denying the fact, scope, mechanisms (for example, gas chambers), or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (“Holocaust”).

The case law of the European Court of Human Rights reveals that Strasbourg has traditionally tackled the issue of Holocaust denial on the basis of Article 17 of the European Convention of Human Rights (finding the violation at stake incompatible with the Convention’s values as such) instead of engaging into detailed proportionality (as in hate speech cases) based on Article 10 ECHR (freedom of speech).⁴⁰ The recent judgement in *PETA v. Germany* (2012) demonstrates a more sophisticated legal deliberation of the Court.⁴¹ The case dealt with advertising within a campaign led by a US-based association (“People for Ethical Treatment of Animals”), entitled “The Holocaust on Your Plate”. It featured images of the inmates from Nazi concentration camps accompanied by pictures of animals kept in mass stocks. The ECtHR upheld the decision of the domestic courts, maintaining that the advertisement trivialized the suffrages of the Holocaust victims and, therefore, the prohibitive measure was found proportional under Article 10 ECHR. Most interestingly from a comparative perspective, the analogous campaign had been carried out in the USA in the same manner, without serious legal challenges.

2.2. EU Law and Decision of the Conseil Constitutionnel

One of the underlining ideas for the harmonization of the Union approach to hate speech and historical revisionism may draw a parallel with the internal market itself, i.e. the goal to prevent racist groups from moving to countries with less restrictive legislation,⁴² as well as the intention to elaborate a common approach on the issue in negotiations on international instruments such as the Council of Europe’s Cyber-Crime Convention, designed for the criminalization of hate speech on the Internet. Another rationale is the codification of the Council of Europe’s approach and case law of the ECtHR on the EU level (embracing the ethos of fundamental rights in the Union) with a subsequent harmonization requirement among Member States.

³⁹ The document states as follows: “Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities”. This “working definition” was adopted in 2005 by the EUMC, now called the European Union Agency for Fundamental Rights (FRA) and disseminated on its website and to its national monitors. Units of the Organization for Security and Co-operation in Europe (OSCE) concerned with combating anti-Semitism also employ the definition.

⁴⁰ Most of the cases reaching Strasbourg on the issue had been found inadmissible, including *T. v. Belgium*, App. No. 9777/82 (1983); *F.P. v. Germany*, App. No. 19459/92 (1993); *Honsik v. Austria*, App. No. 25062/94 (1995); *Remer v. Germany*, App. No. 25096/94 (1995); *Nachtmann v. Austria*, App. No. 36773/97 (1998); *Witzsch v. Germany*, App. No. 41448/98 (1999).

⁴¹ *PETA Deutschland v. Germany*, App. No. 43481/09, Judgement of November 8, 2012.

⁴² Point 5 in the preamble to the *Council Framework Decision on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law*, 2008/913/JHA, suggests that “it is necessary to define a common criminal-law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences”.

The proposal for this harmonized EU ban on hate speech appeared in 2001.⁴³ It took seven years until in November 2008 it was adopted under the German presidency.⁴⁴ The deliberations of Member States perfectly echo the fundamental controversy of such exclusion of certain types of expression. Laurent Pech notes that in 2001 only ten of the current EU countries had criminal provisions on Holocaust denial (Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Romania, Slovakia, and Spain). Several other countries regarded the problem within the realm of hate speech, conjoining the *mens rea* of Holocaust denial with discrimination against Jews or incitement of violence. In other countries “revisionist ideologies” could be punished under general criminal provisions dealing with the maintenance of public peace or those addressing statements and behaviour motivated by racist intent.⁴⁵ Moreover, at least in one EU country (Spain), the constitutional court held the clause penalizing genocide denial in the Criminal Code incompatible with the constitutional right to freedom of speech.⁴⁶ The balancing of freedom of speech and dignity by the Constitutional Tribunal of Spain, in fact, is reminiscent of the marketplace of ideas and content-neutrality in the United States:

La libertad de configuración del legislador penal encuentra su límite en el contenido esencial del derecho a la libertad de expresión, de tal modo que, por lo que ahora interesa, nuestro ordenamiento constitucional no permite la tipificación como delito de la mera transmisión de ideas, ni siquiera en los casos en que se trate de ideas execrables por resultar contrarias a la dignidad humana que constituye el fundamento de todos los derechos que recoge la Constitución y, por ende, de nuestro sistema político.⁴⁷

Moreover, the recent French bill on the criminalization of the Armenian genocide denial was actually drafted as an initiative “transposing EU anti-racist law in national legislation”.⁴⁸ Completely ignoring the issue of EU harmonization in criminal law, the French *Conseil Constitutionnel* struck the law as *per se* contradictory to the constitutional protection of freedom of expression. In a very short decision much less refined than the Spanish 2007 one, the French Court held that:

Considérant qu’une disposition législative ayant pour objet de « reconnaître » un crime de génocide ne saurait, en elle-même, être revêtue de la portée normative qui s’attache à la loi ; que, toutefois, l’article 1er de la loi déferée réprime la contestation ou la minimisation de l’existence d’un ou plusieurs crimes de génocide « reconnus comme tels par la loi française » ; qu’en réprimant ainsi la contestation de l’existence et de la qualification juridique de crimes qu’il aurait lui-même reconnus et qualifiés comme tels, le législateur a porté une atteinte inconstitutionnelle à l’exercice de la liberté d’expression et de communication ; que, dès lors, et sans qu’il soit besoin d’examiner les autres griefs, l’article 1er de la loi déferée doit être déclaré contraire à la Constitution.⁴⁹

⁴³ COM (2001) 664 final, [2002] OJ C 75E, submitted by the Commission on 29 November 2001. The seminal idea for criminalisation stems from the earlier Council Joint Action 96/443/JHA of 15 July 1996 concerning action to combat racism and xenophobia (OJ L 185, 24.7.1996). The latter instrument is now obsolete.

⁴⁴ Council Framework Decision *on Combating Certain Forms and Expression of Racism and Xenophobia by Means of Criminal Law*, 2008/913/JHA. For a detailed account of the controversial history of the Decision’s adoption, see Mark Bell, *Racism and Equality in the European Union*, OUP, 2008. 164-168

⁴⁵ Laurent Pech, *The Law of Holocaust Denial in Europe. Towards a (Qualified) EU-Wide Criminal Prohibition*, *Jean Monnet Working Paper*, 10, 9, NYU School of Law, 2009. 1-51 (at p. 3 & 6).

⁴⁶ *Tribunal Constitucional de España* 235/2007. For a commentary, see Maria Lidia Suárez Espino, *Comentario a la sentencia 235/2007 por la que se declara la inconstitucionalidad del delito de negación de genocidio*, *Revista para el análisis del derecho*, 2, 2008. 1-12.

⁴⁷ *Ibid.*, para. 6 (“The discretion of a criminal legislator is limited by the essential content of the right to freedom of expression, whereas our constitutional system does not allow the criminalization of the mere transmission of ideas, even in cases of execrable ideas that contradict human dignity, which lays the basis of all rights contained in the Constitution and, therefore, of our political system”).

⁴⁸ See *La Proposition de loi portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l’existence du génocide arménien*, 18 octobre 2011, No. 3842.

⁴⁹ Translation: “Considering that a legislative provision having the objective of ‘recognizing’ a crime of genocide would not itself have the normative scope which is characteristic of the law; that nonetheless, Article 1 of the law referred punishes the denial or minimization of the existence of one or more crimes of ‘genocide recognized as such under French law’;

The very wording of the EU Framework Decision appears disproportionate as it leaves a lot of room for speculation and the potential for a chilling effect in the interpretations of the concrete clauses.⁵⁰ Despite the fact that the proposal appeared two months after the tragedy of Twin Towers in New York, its text illustrates that the focus was not on hate speech by Islamic radicals, but on far-right groups and adversaries of immigration policy. Aside from the political rhetoric, the question around this new Brussels instrument is the arguable incentive for the exclusion of something that has been traditionally perceived as political speech.

Tracey Kyckelhan raises an interesting extra-legal point to explain the spillover effect of hate speech bans in European countries. She argues that:

As one political entity or organization adopts certain practice, others will find it compelling to do so as well, often to gain legitimacy as the practice becomes seen as “the way things are done”. This process of increasing conformity is referred to as institutional isomorphism. As will be seen, the institutional structures, political cultures and historical events at the national and international level shaped the development and debate over the EU’s proposed hate speech law.⁵¹

Kyckelhan suggests that the European Commission’s informal power is believed by some political scientists to be at its greatest when information about a topic is vague or when the Commission has more information than Member States.⁵² She observes that for some countries like Italy with a xenophobic movement inside the ruling coalition it was particularly acute. Therefore, the success of the Framework Decision may well be compared to that of the Racial Equality Directive, passed in 2000 to a large degree aimed at the situation of the far-right party in Austria and a consequent intention to avenge the situation.⁵³ Nonetheless, the preamble of the Decision maintains:

Since the Member States’ cultural and legal traditions are, to some extent, different, particularly in this field, full harmonization of criminal laws is currently not possible.

Such wording leaves a certain, albeit very unclear, margin for the states to assess a pure racist (not political) scope of the concrete hate speech utterances.

Another controversial issue, which illuminates the populist character of the Decision, is the exclusion of gender and sexuality as the grounds for hate speech. The hate-speech ban is based on religion, ethnicity, and descent, i.e. exclusively on the groups “identified by certain characteristics (such as race or colour), but not necessarily all of these characteristics still exist. In spite of that because of their descent, such as persons or groups of persons may be subject to hatred or violence”.⁵⁴ The formulation of the *mens rea* in the Framework decision covers not only incitement to violence but also the very expression of hatred.⁵⁵

(Contd.) _____

that in thereby punishing the denial of the existence and the legal classification of crimes which Parliament itself has recognized and classified as such, Parliament has imposed an unconstitutional limitation on the exercise of freedom of expression and communication; that accordingly, without any requirement to examine the other grounds for challenge, Article 1 of the law referred must be ruled unconstitutional [...]” (*Décision du Conseil Constitutionnel*, n° 2012-647 DC du 28 février 2012, para. 6).

⁵⁰ For similar conclusions on over-breadth of the Decision, see John C. Knechtel, *Holocaust Denial and the Concept of Dignity in the European Union*, *Florida State University Law Review*, 36, 2008. 41-65.

⁵¹ Tracey Kyckelhahn, *Hate Speech Laws in Europe and the Role of the European Union*, paper presented at the annual meeting of the American Society of Criminology, Atlanta Marriott Marquis, Atlanta, Georgia, November 13, 2007, available electronically at <http://www.allacademic.com/meta/p201745_index.html>, p. 4.

⁵² *Ibid.*, 6.

⁵³ *Ibid.*, 7.

⁵⁴ Point 7 in the Preamble.

⁵⁵ Article 1 (a): “[Each Member State shall take the measures necessary to ensure that the following conduct is punishable:] publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, color, religion, descent or national or ethnic origin.”

Another important ground for criminalization is the expression of historical revisionism, since the punishable conduct includes:

(c) Publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) Publicly condoning, denying or grossly trivializing the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

In the absence of a Luxembourg (Court of Justice of the European Union) specification of what constitutes “the conduct carried out in a manner likely to incite to violence or hatred against such a group”, it remains difficult to assess the potential of the severe and unequivocal criminalization of historical revisionism in the EU. What is striking on the surface is the extremely broad scope of the criminalized offence. That makes the Decision a potential watchdog for a free historical discussion with regard to the contradictory aspects of World War II. Moreover, the Decision suggests the term of such criminal effect being at least between one and three years of imprisonment.⁵⁶ The *lex personae* of the Decision is not limited to individuals and encompasses legal persons,⁵⁷ which leaves an important discretion for a state to grapple with certain political movements.⁵⁸

Although the Directive clearly maintains that it does not require States to take measures that contravene the fundamental right to freedom of expression,⁵⁹ the yardstick of the compatibility with freedom of expression is unclear. The only reasonable *tertio comparationis* in the situation of a potential clash seems to be the analysis of the Strasbourg case law on Article 10 ECHR.

Moreover, considering the new, more strongly embedded paradigm of fundamental rights in the Union law, subsequent to the parallel changes brought by the Treaty of Lisbon (2008-2010), the domestic catalogue of fundamental rights in the Union (the EU Charter of Fundamental Rights) became part of primary law.⁶⁰ The inscription of the dignity in the Charter (absent in the text of the European Convention of Human Rights) sheds a fresh light into the ethical dimension of EU integration, arguably capable of justifying partial criminalization of Holocaust denial. Yet unlike the formulation of the right to freedom of speech in the Convention, Article 13 of the Charter encompasses a special scope for artistic and academic freedom of expression. It maintains as follows:

[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Likewise, Article 15 (3) of the UN Covenant on Economic, Social and Cultural Rights (ICESCR) provides that contracting States “undertake to respect the freedom indispensable for scientific research and creative activity”. Therefore, it appears important that the Charter positions freedom of speech not as a pure right to freedom of artistic or scientific expression but as a strong stipulation that the arts and

⁵⁶ Article 3 (2).

⁵⁷ Article 5.

⁵⁸ The subsequent Article 6 suggests the measures as follows: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent disqualification from the practice of commercial activities; (c) placement under judicial supervision; (d) a judicial winding-up order.

⁵⁹ Article 7.

⁶⁰ Article 6 of the Treaty on the European Union, *inter alia*, obliges the EU to accede the European Convention of Human Rights, confirms the previous scope of fundamental rights as general principles of EU law, derived from the constitutional traditions of the Member States and the European Convention of Human Rights, and makes Charter a directly enforceable instrument of primary law.

scientific research be free from constraint. Subject to effective enforcement of this Charter's clause beyond a purely "guiding principle", the vision of freedom of expression in the Union law should encompass a wider scope of academic liberty. Furthermore, the wider scope of freedom of speech in the Charter should rather extend it to historical revisionism than criminalize genocide denials.

Finally, Article 9 of the Decision creates the basis for judicial cooperation and the detention of suspects in the territory of other member states.⁶¹ The Decision came into force on 28 November 2010, i.e. the same year as the Lisbon Treaty, which makes the Charter (with its emphasis on academic freedom of expression) a part of primary EU Law. In 2013, the Council shall assess the extent to which Member States have complied with the provisions on the basis of national reports.

3. Historical Revisionism in Central and Eastern Europe

3.1. Context and Legal Aspects of Historical Revisionism in CEE

Among the three countries of CEE scrutinized, only the Czech Criminal Code contains an unambiguous clause about historical revisionism, which nonetheless does not mean that Holocaust denial is exempted from criminal provisions in general. Polish and Hungarian criminal doctrines conceive certain forms of historical revisionism within the vast category of hate speech (or hate propaganda), which is itself a rather dubious approach since, as was demonstrated previously, historical revisionism cannot be equated to hate speech.

The crime of "denial, questioning, approval, and justification of genocide" found its accommodation in Chapter XIII of the Czech Criminal Code (crimes against humanity, peace and war crimes), along with the crimes of genocide, crimes against humanity, apartheid and ethnic discrimination, etc. § 405 of the new Criminal Code (2009), which entered into force in 2010, maintains the following:

The person who publicly denies, doubts, approves or tries to justify Nazi or Communist genocide or other Nazi or Communist crimes against humanity shall be punished by imprisonment from 6 months to 3 years.⁶²

Thus, the criminal construction of historical revisionism in the Czech Republic transcends pure Holocaust denial and embraces a series of genocide atrocities, including those of the communist period.

The status of the criminal provision on the Holocaust denial in the Hungarian Criminal Code is currently unclear. As has been known from the numerous press discussions in 2010, the Hungarian parliament declared the denial or trivialization of the Holocaust a crime punishable by up to three years imprisonment in February 2010.⁶³ The President of the Republic signed the law in March 2010. At that time it was still the office of the former president (previously also the president of the Constitutional Court), László Sólyom.⁶⁴ However, in the meantime the parliament has changed and the power is now concentrated in the hands of the right-wing Fidesz party. In June 2010, the newly-

⁶¹ For an account of cross-border cooperation, see Mark Bell, *Racism and Equality in the European Union*, OUP, 2008. 168-171. For a more general recent account of the dispositions for the post-Lisbon development of EU criminal law, see Ester Herlin-Karnell, "What Principles Drive (or Should Drive) European Criminal Law?", *German Law Journal*, 11, 2010. 1115-1130.

⁶² § 405 (popírání, zpochybňování, schvalování a ospravedlňování genocidia): "Kdo veřejně popírá, zpochybňuje, schvaluje nebo se snaží ospravedlnit nacistické, komunistické nebo jiné genocidium nebo jiné zločiny nacistů a komunistů proti lidskosti, bude potrestán odnětím svobody na šest měsíců až tři léta."

⁶³ "Hungarian Lawmakers Make Holocaust Denial Illegal", *jta.org*, available electronically at <<http://jta.org/news/article/2010/02/23/1010758/hungary-parliament-vote-makes-holocaust-denial-illegal>>.

⁶⁴ "President Sólyom Signs Holocaust Denial Bill", *politics.hu*, available electronically at <<http://www.politics.hu/20100311/president-solyom-signs-holocaust-denial-bill>>.

elected parliament formulated the law that “punishes those, who deny the genocide committed by national socialist or communist systems”.⁶⁵ The initiatives of the new Prime Minister Viktor Orbán, head of Fidesz are currently severely criticised, *inter alia*, on allegations of the impairment of freedom of speech. Amongst other critiques, it was suggested that the new Constitution relieves the culpability of Hungarian state for the prosecution of the Jews and Roma during World War II, since the Preamble to the Constitution maintains that the nation lost its self-determination from the outset of German occupation of the country until the collapse of Soviet power just two decades ago.⁶⁶ The destiny of a new criminal provision remains uncertain. The available English translations of the Hungarian criminal code do not contain a norm similar to the Czech counterpart.

Poland is an exemplary CEE case of sensitivities towards the historiographical issues of the 20th century, considering both the Nazi and communist atrocities that happened on its territory. A special governmental institution, the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation (*Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu*) was established as a government-affiliated research institute with lustration prerogatives and prosecution powers founded by specific legislation. The Act of 18 December 1998 on the Institute of National Remembrance (Commission for the Prosecution of Crimes against the Polish Nation)⁶⁷ stipulates a criminalization of historical revisionism, in particular in Article 55:

The person who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.

Article 1 of the Act addresses:

1. The registration, collection, access, management and use of the documents of the organs of state security created and collected between 22 July 1944 and 31 December 1989, and the documents of the organs of security of the Third Reich and the Union of Soviet Socialist Republics concerning:

a) Crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989:

- Nazi crimes,

- communist crimes,

- other crimes constituting crimes against peace, crimes against humanity or war crimes

b) Other politically motivated repressive measures committed by functionaries of Polish prosecution bodies or the judiciary or persons acting upon their orders, and disclosed in the content of the rulings given pursuant to the Act of 23 February 1991 on the Acknowledgement as Null and Void Decisions Delivered on Persons Repressed for Activities for the Benefit of the Independent Polish State.

Even without a specific legal basis tackling Holocaust denial, the criminalization of historical revisionism was doctrinally constructed in a German fashion, as a part of the *Volksverhetzung* (incitement of popular hatred).⁶⁸ In all three countries hate speech clauses are semantically formulated

⁶⁵ “Hungary Equates Communism to Nazism”, rt.com, available electronically at <<http://rt.com/politics/nazism-communism-hungary-equate/>>.

⁶⁶ Thomas Ország-Land, “New Hungarian Constitution Shirks Responsibility for the Holocaust”, *New English Review*, September 2011, available at <http://www.newenglishreview.org/custpage.cfm/frm/96102/sec_id/96102>.

⁶⁷ *Ustawa z dnia 18 grudnia 1998 r. o Instytucie Pamięci Narodowej - Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu*.

⁶⁸ *Volksverhetzung* is a criminal offense under Section 130 of the Criminal Code (*Strafgesetzbuch*). It can lead to up to five years’ imprisonment. To qualify for this offense, a person should incite hatred against the population or call for violent or arbitrary measures against them, or otherwise assault the dignity of others by insulting, maliciously maligning, or defaming segments of the population. Most importantly, those acts should disturb the peace. For many years that criminal clause was interpreted as covering Holocaust denial, while in the 1990s special provisions on Holocaust denial as well as,

as the incitement of hate propaganda. Under this doctrinal vision, the incitement can be applied (although it is not limited) to trials relating to Holocaust denial. It is of no particular surprise that the countries scrutinized borrowed the German criminal model, considering the traditional influence of Germanic legal concepts on the CEE region and the linguistic capacities of the judges. Another feature of CEE is emblematic for the influence of German and Austrian visions of historical revisionism. The region of CEE was a primary arena of the Holocaust, with a vast number of European Jewry annihilated during World War II and numerous traces of the former concentration camps in the semiotic space of museums and other sites of cultural commemoration, including “Polish” Auschwitz.⁶⁹ However, Nazi Germany was condemned as a culprit of the Holocaust, whereas (with important disclaimers about the neglected histories of collaborationism) CEE should be distinguished as a region where the atrocities took place. The question then is how far can the German model of “culpits” (*Vergangenheitsbewältigung*) be imported into the legal systems of the supposedly “victims”?

3.2. Historical Revisionism before Courts in CEE

A Polish case regarding a Holocaust trial is quite illuminating in this regard. The trial arose as an accusation against a book by Dr. Dariusz Ratajczak, a researcher at the University of Opole. A former active member of the extreme right National Party, in March 1999 he published a monograph entitled “*Tematy niebezpieczne*” (Dangerous Topics), full of anti-Semitic allegations. It claimed *inter alia* that the German Nazi elite consisted of Jews and included a chapter specifically devoted to the denial of the Holocaust. In his article, Marcin Kornak reconstructs the case. The Auschwitz museum obtained a copy of the Ratajczak book and informed the then-chairman of the Commission for Research on Crimes against the Polish Nation (*Komisja Badania Zbrodni przeciwko Narodowi Polskiemu*), Professor Witold Kulesza, who in turn informed the prosecutor’s office:

In December 1999 the local court in Opole declared that Ratajczak had broken the law against Holocaust denial but that his crime had caused “negligible harm to society”. The verdict was met with criticism from various corners especially from former inmates of Nazi camps. On the other side, two mainstream liberal newspapers (*Gazeta Wyborcza* and *Rzeczpospolita*) said that in the name of freedom of speech Ratajczak should not be prosecuted. After a lengthy appeal procedure, in December 2001, the District Court in Opole reconfirmed the verdict. In the meantime, Ratajczak has been suspended as a lecturer at the University of Opole since March 2000.⁷⁰

The Constitutional Tribunal of Poland had to address the problem of historical revisionism indirectly in 2008, when it held unconstitutional a clause in the Criminal Code, the so-called “slander of the Polish Nation” (*pomówienie Narodu Polskiego*).⁷¹ The case was brought by the Ombudsman (*Rzecznik Praw Obywatelskich*) and addressed the amendment to the Code, which penalized public libel of the Polish Nation by making accusations of participation in communist or Nazi crimes or responsibility for them (envisaging up to three years of imprisonment). Moreover, criminal responsibility for this offence was decoupled from the identification of the place where the crime was committed and the nationality of the perpetrator. The Ombudsman emphasized that initially the issue was subject to protection under Article 133 of the Criminal Code, which penalizes insults against the people or the Polish Republic. He pointed out that the essence of the “insult” is the inability to assess the behavior in terms of the value of logical truth or falsehood; the concept instead belongs to the realm of values. The amendments to Criminal Code essentially changed the situation. The Ombudsman mentioned that

(Contd.) _____

most recently, on justifying or glorifying the Nazi government were added. In addition section 86a (use of symbols of the unconstitutional organizations) of the Criminal Code outlaws Nazi symbols and insignia.

⁶⁹ See Barbara Szacka, Polish Remembrance of World War II, *International Journal of Sociology*, 36, 4, 2006-7, 8-26.

⁷⁰ Rafal Pankowski & Marcin Kornak, “Poland”, in Cas Mudde, *Racist Extremism in Central and Eastern Europe*, Routledge, 2005. 156-182 (at p. 173).

⁷¹ *Wyrok Trybunału Konstytucyjnego, K 5/07* (19 September, 2008). See also Mateusz Woiński, *Przestępstwo tzw. pomówienia Narodu Polskiego (de lege derogata)*, *Państwo i Prawo*, 6, 2009. 76-89.

when used in the new article (Article 132a), the term “slander” (*pomówienie*) should be understood on the basis of a uniform reading of the Criminal Code. The slander was penalized earlier in Article 212, which created criminal responsibility for raising or broadcasting the alleged facts that can be verified in terms of truth or falsehood.

The initiative to insert the provision in the Criminal Code was inspired by the ultra-conservative Polish government of the epoch, whose concern was *inter alia* to criminalize allegations on behalf of journalists and historians about possible participation of the Polish people in Nazi atrocities. The Attorney General opposed the view of the Ombudsman, suggesting that the “Polish Nation” is defined in the preamble to the Polish Constitution as being wider than Polish ethnicity, covering all citizens of Poland. Nonetheless, the Attorney General shared the view of the Ombudsman on the overly broad construction of the new provision, bringing serious challenges of chilling effects in terms of the constitutional protection of freedom of speech. The speaker of the *Sejm* (lower chamber of the Polish parliament) noted that the very existence of sanction brings uncertainty for historical research about communist and Nazi atrocities, whose authors may abstain from publication of the results of such independent research under fear of criminal prosecution.

The Constitutional Tribunal revealed a series of procedural drawbacks in the adoption of the amendment, indicating that a hastily reflected amendment of the Senate did not leave the MPs sufficient time for deliberations about its pertinence.⁷² The provision was also meant to enter the aforementioned Act on the Institute of National Remembrance rather than the Criminal Code. Thus, without a thorough discussion on the incompatibility with the constitutional protection of freedom of expression, the Tribunal held the provision unconstitutional on the grounds of procedural defects. Although this decision can only be welcomed, the refusal of the Court to hold the provision straightforwardly unconstitutional as contradicting freedom of expression is striking.

One of the features of socio-legal discourses on historical revisionism in the region is an intimate relation with victimhood due to the often-abusive delimitation of national borders in the region by superpowers after the two World Wars. The most illustrative example of these sensibilities towards the question of borders is the case of revisionist rhetoric in Hungary.⁷³ Cultural nationalism in the country has for a long time been linked to the idea of the so-called “Great Hungary”, a strong identity trauma that emerged as the result of the Treaty of Trianon (1920). It defined new borders for the Hungarian state which entailed the loss of about 72% of its territory and about two thirds of its inhabitants. Hungarian revisionists claim that the Treaty was an injury for the Hungarian people, appealing to the ideology of the perceived injustice and restoration of borders of the historical Kingdom of Hungary. In their rhetorical practices, the revisionists often dismiss or ignore the fact that most of these territories hosted non-Hungarian ethnic majorities, and minimize the role that forced Magyarization played in stirring nationalist feelings among non-Hungarian groups. Marxist-Leninist ideology and Stalinist theory referred to nationalism as a malady of bourgeois capitalism, forcing the issue of minorities to disappear from public discussion. The post-communist democratization and proclamation of free speech contributed to the resurrection of the revisionist narratives in all three countries scrutinized.⁷⁴ Whether or not these discourses can be equated to Holocaust denial is *per se* a complicated ethical question.

Furthermore, in all three countries scrutinized, World War II resulted in the expulsion (*Vertreibung*) of significant portions of the German population, which affects another sensitive page of CEE

⁷² On the evolution of the views of the Constitutional Tribunal of Poland about the legislative capacities of Sejm and Senate, see Beata Szepietowska, “Proces ustawodawczy”, in Zdzisław Jarosz, *Parlament: Model konstytucyjny a praktyka ustrojowa*, Wydawnictwo Sejmowe, 2006. 114-116.

⁷³ See Antal Örkény, Hungarian National Identity: Old and New Challenges, *International Journal of Sociology*, 35, 4, 2005-2006. 28-48.

⁷⁴ For a detailed account of the historiography, see Michal Kopeček (ed.), *Past in the Making: Historical Revisionism in Central Europe after 1989*, CEU Press, 2008.

historiography.⁷⁵ During the communist period, the concrete historical episodes and evaluations of this expulsion in CEE (where it is usually addressed rather as displacement, compared to Czech “*odsun*”) for a long time have been a matter either of outright taboo or a clear ideological vision of who were the good guys and who were the bad guys. The difference in the assessments of German and national historians from CEE subsequently entered the space of political populism, discussed under the label of *Geschichtspolitik* (politics of memory), a particular intentional attitude towards the past among intellectual and political elites.⁷⁶

In its third report on Hungary, the European Commission on Racism and Intolerance encouraged the Hungarian authorities to take into account the recommendations on criminal law provisions contained in its General Policy Recommendation No. 7 on national legislation to combat racism and racial discrimination, according to which the law should penalize racist acts, including public denial of the crime of genocide with a racist aim.⁷⁷ Holocaust denial is a particularly sensitive issue in Hungary, considering that before World War II, Budapest was home to an estimated 200,000 Jews, who made up almost a quarter of the city’s population. Nowadays the Hungarian capital remains home to CEE’s largest Jewish population, with some estimates as high as 100,000. It also boasts Europe’s largest synagogue. The government has taken certain steps to combat anti-Semitism. A permanent Holocaust Memorial Centre was opened in 2006, and efforts have been made to determine the status and whereabouts of Hungary’s Holocaust records. In addition, Act XLVII of 2006 created an opportunity for individuals whose immediate relatives were killed in the Holocaust or were sent to Soviet forced labor camps to seek compensation. On a more symbolic level, the name of a former high-ranking Nazi official was removed from the name of the National Epidemiology Centre.⁷⁸

András Sajó (currently a Hungarian judge in Strasbourg) reminds us that the first case on hate speech before the Constitutional Court of Hungary arose in practice due to the problem of a Holocaust denial brought before the district court.⁷⁹ *Szent Korona* (Holy Crown) and *Hunnia*, two right-wing periodicals, published a series of anti-Semitic, anti-gypsy, and anti-Slovak articles, denying the existence of the Holocaust and making reference to a global Jewish conspiracy. The public prosecutor charged the author of the articles in *Hunnia* under Article 269 of the Criminal Code (criminalizing “incitement to hatred”). In 1991, the district court suspended the prosecution and requested the Constitutional Court to decide whether Article 269 of the Criminal Code is in conformity with the constitution, which led to a long “hate speech” saga at the Hungarian Constitutional Court.⁸⁰

In Poland, serious concerns were repeatedly raised about the activities of *Radio Maryja* and related Polish media (belonging to an ultra-Catholic organization) in their speculations on the issue of the so-called “Holocaust industry”. Amongst other incidents, in January 2000 Ryszard Bender, a historian from the Catholic University of Lublin, speaking on Radio Maryja with a convinced Holocaust denier Dariusz Ratajczak, caused a controversy. He stated that Auschwitz was not an extermination camp but

⁷⁵ See Bernadetta Nitschke, *Vertreibung und Aussiedlung der deutschen Bevölkerung aus Polen 1945-1949*, Oldenbourg Wissenschaftsverlag, 2003.

⁷⁶ See Dariusz Gawin & Paweł Kowal, «Polska polityka historyczna», in *Polityka historyczna. Historycy – politycy – prasa*, Museum Powstania Warszawskiego, 2005.

⁷⁷ *ECRI Report on Hungary* (fourth monitoring cycle), CRI (2009), point 16, p. 14.

⁷⁸ *Ibid.*, point 70, p. 26.

⁷⁹ András Sajó, “Hate Speech for Hostile Hungarians”, *East European Constitutional Review*, 78, 1994. 82-87 (at p. 84).

⁸⁰ Decision 30 (1992). Later it was followed by the numerous attempts by the Hungarian parliament to revisit and extend the clause on hate speech in the Criminal Code beyond the wording of “incitement to hatred”. The rather neutral formulation of Article 262 (1) permitted by the Court was criticized as being toothless in terms of providing an actual criminal basis for prosecution. However, in a subsequent series of judgements, the Constitutional Court of Hungary has declined the opportunity to broaden the scope of the prohibited “incitement” to “arousal of hatred” (decision 12/1999), “inflaming hatred” (decision 18/2004), “gestures reminiscent of a totalitarian regime and denigrating a member of a given group” (decision 95/2008), as well as an attempt to prescribe hate speech prohibition in the Civil Code (decision 96/2008).

merely a large labor camp for Jews.⁸¹ Polish prosecutors do not seem particularly willing to invoke hate speech clauses against the revisionists from this obscurantist religious milieu.

Another major historiographic conflict characteristic to CEE after the collapse of the communist system deals with the assessment of that very system, as well as with numerous accounts of “collaboration” with Soviet regimes. As suggested by some historians, the *Geschichtspolitik* has been in constant competition with serious historical scholarship, advancing a unified interpretation over sound argument.⁸² Yet the politics of coming to terms (in Czech, *vyrovnávání*) with the Communist past was an important strategic vector in the most recent construction of national identities in the transition period.⁸³ In his legal account of the engagement of post-communist law with a totalitarian past, Jiří Příbáň refers to Jürgen Habermas’s communication action and suggests a discourse ethics for tackling the problems of the latest political “conversation” over the past. He deconstructs the fiction of legitimation over history, the role of dissent, and the dichotomy of forgetting versus memory:

Forgetting the non-legal sources of legality supports the self-legitimation of law in stabilized modern societies. In times of complex social changes and reconstructions, however, people retreat to the entirely opposite strategy in the field. The self-legitimation and reproduction of law are interrupted and, instead of forgetting, memory has the primary importance. Any complex political change initiates the perspective which takes law as a highly political normative system that must be re-defined and re-constituted. In times of complex social and political change, social memory reveals the non-legal sources and conditions of legitimacy of law.⁸⁴

Finally, in all three countries scrutinized a problem was raised in relation to the visits and public “lectures” by renowned Holocaust deniers from Western countries, such as David Irving. The issue can be illustrated with an example of the police arrest of David Duke in the Czech Republic on 24 April 2009. Duke is a US citizen, and a former leader of the Ku Klux Klan racist movement. He was supposed to give a series of lectures in Prague, in particular at Charles University, where his meeting was banned. He is suspected of denying or approving of the Nazi genocide, which is punishable by the Czech Criminal Code by up to three years of imprisonment. Members of a far-right group known as “Národní Odpor” reportedly guarded Duke. He was released on the condition that he leaves the country by midnight on 25 April 2009.⁸⁵

4. Conclusions: Towards the Ethics of Memory via Free Speech

“From the place where we are right
Flowers will never grow [...]”
Yehuda Amichai

The paper demonstrated the inadequacy of the “criminal model” for CEE stemming from a dubious approach that conceives historical revisionism as hate speech *sui generis*. Among the countries scrutinized, only the Czech Republic has drafted an explicit criminal clause on historical revisionism. Hungarian legislators have recently attempted to single out this offence in the statute. The Polish

⁸¹ See <<http://www.radiomaryja.pl.eu.org>>.

⁸² Michal Kopeček, “In Search of ‘National Memory’: the Politics of History, Nostalgia and the Historiography of Communism in the Czech Republic and East Central Europe”, in Michal Kopeček (ed.), *Past in the Making: Historical Revisionism in Central Europe after 1989*, CEU Press, 2008. 75-95 (at p. 91).

⁸³ See Jacques Rupnik, *Politika vyrovnávání s komunistickou minulostí. Česká zkušenost*, *Soudobé dějiny*, 9, 1, 2002. 9-26.

⁸⁴ Jiří Příbáň, *Dissidents of Law: On the 1989 Velvet Revolutions, Legitimations, Fictions of Legality and Contemporary Version of the Social Contract*, Ashgate, 2002. 157.

⁸⁵ See *Státní zástupkyně zastavila stíhání Duka kvůli knize*, *Tyden.cz*, available electronically at <http://www.tyden.cz/rubriky/domaci/rasismus-v-cesku/statni-zastupkyne-zastavila-stihani-duka-kvuli-knize_140970.html>.

example illustrates how the issue can be easily misconstrued in a most detrimental way for freedom of speech. It is unfortunate that the Constitutional Court struck the clause criminalizing the “libel of the Polish Nation” (*pomówienie Narodu Polskiego*) on purely technical grounds and not as *per se* contradictory to the constitutionally protected freedom of expression. The Polish example also illustrates an institutional model of addressing historical revisionism (with a state body responsible for the issues of historical memory). Notwithstanding the rationale behind the whole idea, whether this institutional engagement with historical narratives has been successful remains more than doubtful.

The constitutional doctrine of all three countries incorporated the Germanic *Volksverhetzung* to cover historical revisionism. How far the Germanic model of “culprits” can be imported into the legal systems of the “victims” remains an equally ambiguous issue. At the same time, the whole “victimhood” argument inspires endless speculations and requires infinite disclaimers. The CEE history of the first half of the 20th century used to be the result of the “negotiation” vision between the Allies. Alternative historiographies have not had the chance to be adequately accommodated. Moreover, the enterprise of “drafting history” in CEE has often been inseparable from *Geschichtspolitik* and numerous national complexes, pertaining to the romantic nationalism of the 19th century.

A primary arena of Holocaust, the CEE region reserves a specific sensibility towards Jewish history. It attempts to overcome the unsavoury memories of virulent anti-Semitism. The legal engagement into historical discussions does not endure the challenges of academic liberties. Another specifically Central European topic concerns the appraisal of the communist past and legal attempts to censor the evaluation of this segment of history. Historiography often stands as an agent of power delimitating the “authorized truth” as well as interplaying with mass traumas.

In this respect, a trauma should be conceived of as any unexpected experience in which the subject is unable to assimilate. These individual and collective traumas (infinitely interrelated with historical memories) circulate in the socio-symbolic public sphere, and operate through repression, oppression, and the media. In the literature, it is argued that national trauma can only be treated by using modified psychoanalytical methods, such as political discussion, testimony, and deliberation as ways of dealing with national crises. Society uses essentially similar defenses to those unconsciously applied by the individual (such as reaction-formation, isolation, undoing, projection, and turning against oneself). The final defense mechanism for nations and individuals experiencing trauma is that of turning against oneself, which occurs when the “torturer begins to torture himself”.⁸⁶

For societies in which national victimhood is still explicitly articulated and which were deprived of the opportunity to discuss their history – alternative to that imposed by the superpowers after World War II, whose semiotic spaces trace the tragedies and *lieux de mémoire* of Holocaust and communist atrocities, the criminalization of alternative modes of constructing history immediately brings a chilling effect on the advancement of historical truth and the construction of new “contra-xenophobic” identities. The continued treatment of history as a discourse (apparent in the EU Framework Decision 2008/913), which can be imposed by authority in a mode similar to the most archaic political propaganda, brings dividends only to the camps of political populists, who have been exploiting the national inferiority complexes, a sense of victimhood stemming from the way national borders were imposed, and recurrent anti-Semitism. Moreover, they can use it as a generous incentive for further speculations on CEE’s phobias about conspiracy. The legal stance on history (be it Armenian genocide, Shoah, or revisionist writings on wartime in CEE) badly needs a new approach that conceives the ethics of memory in the terrain of freedom of speech instead of surrogate mourning.

⁸⁶ See Shelliann Powell, “Psychoanalysis and the Study of Political Science”, in Howard J. Wiarda (ed.), *Grand Theories and Ideologies in the Social Sciences*, Palgrave Macmillan, 2010. 97-112. See also Joachim J. Savelsberg & R. D. King, Law and Collective Memory, *Annual Review of Law & Social Science*, 3, 2007. 189-211; Jeffrey K. Olick & Joyce Robbins, “Social Memory Studies: From ‘Collective Memory’ to the Historical Sociology of Mnemonic Practices”, *Annual Review of Sociology*, 24, 1998. 105-140.

